88-1996

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In The

Supreme Court of the United States

October Term, 1988

ROBERT DAMINO,

Petitioner,

vs.

MARTIN C. BARRELL, R. CARLOS CARBALLADA, WILLARD Z. GENRICH, EMLYN I. GRIFFITH, JORGE L. BATISTA, LAURA B. CHODOS, LOUISE P. MATTEONE, J. EDWARD MEYER, FLOYD LINTON, SALVATORE SCLAFINI, MIMI LIEBER, SHIRLEY C. BROWN, NORMA GLUCK, THOMAS R. FREY, JAMES W. McCABE SR., KENNETH B. CLARK, GORDON M. AMBACH, DAVID AXELROD, GLENN E. HAUGHIE, and KATHLEEN TANNER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

If under 42 U.S.C. § 1983 plaintiff asks for a federal court to issue a temporary restraining order to stay the enforcement of a state court order pending completion of state court appellate proceedings, and the federal court refuses to assume jurisdiction to issue said order on grounds of the principles of *Younger v. Harris*, 401 U.S. 37 (1971) can the federal court nevertheless rule on the underlying merits of the case such that said ruling has a preclusive effect on a later case on the merits?

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No.

In The

Supreme Court of the United States

October Term, 1988

ROBERT DAMINO,

Petitioner,

vs.

MARTIN C. BARRELL, R. CARLOS CARBALLADA, WILLARD Z. GENRICH, EMLYN I. GRIFFITH, JORGE L. BATISTA, LAURA B. CHODOS, LOUISE P. MATTEONE, J. EDWARD MEYER, FLOYD LINTON, SALVATORE SCLAFINI, MIMI LIEBER, SHIRLEY C. BROWN, NORMA GLUCK, THOMAS R. FREY, JAMES W. McCABE SR., KENNETH B. CLARK, GORDON M. AMBACH, DAVID AXELROD, GLENN E. HAUGHIE, and KATHLEEN TANNER,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit appears in the Appendix at 1a (Appendix A). The judgment to be reviewed was dated and entered March 8, 1989.

STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provision of the United States Constitution involved is Section 1 of Article XIV which provides in relevant part that

> No State shall . . .; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

The statutory provision involved is 42 U.S.C. § 1983 which provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

STATEMENT OF THE CASE

Petitioner was a physician duly licensed to practice medicine in the State of New York. In July 1983 charges of professional misconduct were brought against petitioner. After an administrative hearing before the New York State Board for Professional Medical Conduct, petitioner was found guilty of certain charges, and a recommendation was made to revoke his medical license. Said recommendation was accepted by the New York State Commissioner of Health and thence by the New York State Board of Regents, the final decision-making body. Pursuant thereto an order was issued by the New York State Commissioner of Education revoking petitioner's medical license. Said order and the decision of the New York Board of Regents were challenged in a proceeding under New York Education Law, § 6510 a(4) and Article 78, New York Civil Practice Law and Rules in the New York State Supreme Court, Appellate Division, Third Department. On October 9, 1986 the Appellate Division, Third Department affirmed the determination of the New York State Board of Regents revoking petitioner's medical license. *Damino v. Board of Regents,* 124 A.D. 2d 271, 508 N.Y.S. 2d 618 (3rd Dept. 1986).

Petitioner moved for leave to appeal to the New York Court of Appeals. Petitioner also brought an action in federal District Court undex 42 U.S.C. § 1983 requesting that the District Court issue a temporary restraining order enjoining the enforcement of the state court order revoking petitioner's medical license pending a final determination of petitioner's appeal by the New York Court of Appeals. In a decision and order dated September 28, 1987 (Appendix C) the federal District Court refused to grant petitioner's application for a temporary restraining order and determined that petitioner's complaint failed to state a claim. Petitioner's complaint was dismissed. Judgment thereon was entered December 10, 1987. A week later, December 17, 1987,

the New York Court of Appeals denied petitioner's motion for leave to appeal to the Court of Appeals. Petitioner did not appeal the aforementioned federal District Court decision.

On April 29, 1988 petitioner commenced a civil rights action for damages under 42 U.S.C. § 1983. Petitioner claimed a multitude of due process violations, both substantive and procedural, with respect to the state proceedings leading to the revocation of petitioner's medical license. In a decision and order of Judge Mishler dated October 18, 1988 (Appendix B) he ruled that petitioner was precluded from bringing said action on grounds of *res judicata* because of both the previous New York state court decision, *Damino v. Board of Regents, supra,* and the previous federal District Court decision (Appendix C) (wherein Judge Mishler refused to grant petitioner a temporary restraining order enjoining enforcement of the state court order revoking petitioner's medical license). Petitioner's complaint was dismissed. Petitioner appealed to the United States Court of Appeals for the Second Circuit.

In a decision of the United States Court of Appeals for the Second Circuit (Appendix A) dated March 8, 1989, the court affirmed Judge Mishler's decision that petitioner was precluded from bringing the civil rights action of April 29, 1988 because the first federal District Court action wherein petitioner was denied a temporary restraining order resulted also in a ruling on the merits of petitioner's constitutional claims. The Second Circuit made no ruling on the preclusive effect of the prior state court proceedings, stating that it was unnecessary to make such ruling because of the federal preclusion.

REASONS FOR GRANTING THE WRIT

Petitioner's complaint in his first federal District Court suit wherein he asked for enjoinment of a state court order pending

completion of state appellate proceedings was dismissed under *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746 (1971). Under *Younger* a federal court is required to abstain from assuming jurisdiction. A dismissal under *Younger* is for lack of jurisdiction. A dismissal for lack of jurisdiction is not on the merits. If a case does not fit one of the exceptions to *Younger* the federal court should not proceed to the merits. *Huffman v. Pursue Ltd.*, 420 U.S. 592, 95 S. Ct. 1200 (1975). The District Court although dismissing petitioner's complaint under *Younger* erroneously proceeded to the merits of the case, ruled on the merits and then later held that said ruling precluded petitioner's second action in federal District Court.

Without jurisdiction there can be no ruling on the merits. Without a ruling on the merits there is no preclusion. *Federated Department Stores v. Moitee*, 452 U.S. 394, 398.

According to the decision of the Second Circuit a federal District Court faced with a *Younger* situation (and the case not fitting one of the *Younger* exceptions) and having to abstain from assuming jurisdiction, nevertheless, has the right to decide for itself whether it wants to rule on the merits of the case and has the right to declare that it is ruling on the merits of the case and if such declaration is made the court is deemed to have ruled on the merits of the case. That is not the law, nor has it ever been the law.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

WILLIAM D. FRIEDMAN
Attorney for Petitioner

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED MARCH 8, 1989

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 8th day of March, one thousand nine hundred and eighty-nine.

PRESENT:

HONORABLE LAWRENCE W. PIERCE,
HONORABLE FRANK X. ALTIMARI,
Circuit Judges,

HONORABLE ROBERT J. KELLEHER,
*District Judge.**

No. 88-7960

ROBERT DAMINO,

Plaintiff-Appellant,

vs.

MARTIN C. BARRELL, R. CARLOS CARBALLADA, WILLARD Z. GENRICH, EMLYN I. GRIFFITH, JORGE L. BATISTA, LAURA B. CHODOS, LOUIS P. MATTEONE, J.

---

* Hon. Robert J. Kelleher, Senior Judge, United States District Court for the Central District of California, sitting by designation.

Appendix A

EDWARD MEYER, FLOYD LINTON, SALVATORE SCLAFINI, MINI LIEBER, SHIRLEY C. BROWN, NORMA GLUCK, THOMAS R. FREY, JAMES W. McCABE SR., KENNETH B. CLARK, GORDON M. AMBACH, DAVID AXELROD, GLENN E. HAUGHIE, and KATHLEEN TANNER,

Defendants-Appellees.

ORDER

Robert Damino appeals from a judgment of the United States District Court for the Eastern District of New York, Mishler, *J.*, granting defendants-appellees' motion to dismiss appellant's complaint.

Appellant was a psychiatrist licensed to practice medicine in the State of New York when, in July 1983, he was charged with grave professional misconduct in his treatment of two patients. Those instances of misconduct, and the extensive state proceedings that were held to review that misconduct, are fully discussed in *Damino v. Board of Regents*, 124 A.D.2d 271, 508 N.Y.S.2d 618 (3d Dep't 1986), *app. denied*, 70 N.Y.2d 613 (1987). In January 1986, at the conclusion of the state proceedings, the New York State Commissioner of Education ordered that the appellant's license to practice medicine be revoked.

Appellant unsuccessfully attempted to challenge that order in state court. *See id.* Appellant then brought suit in the United States District Court for the Eastern District of New York, Mishler, *J.*, seeking a stay of the state proceedings and, on procedural due process grounds, challenging the constitutionality of the state revocation proceedings. In an order of September 28, 1987, Judge

Appendix A

Mishler dismissed appellant's complaint on defendants' motion under Federal Rule of Civil Procedure 12(b)(6). Appellant concedes that he did not appeal from the judgment on that order.

On April 29, 1988, appellant brought yet another suit under 42 U.S.C. § 1983, again challenging the constitutionality of the state revocation proceedings. The case was assigned to Judge Mishler, who, in an order dated October 18, 1988, again dismissed the complaint, holding that suit was barred by the prior adverse rulings in both state and federal courts. Judge Mishler ordered judgment for the defendants and, per Fed. R. Civ. P. 11, imposed sanctions on the appellant and his attorney for bringing a meritless claim.

On appeal, appellant does not contest the imposition of those sanctions. Instead, appellant contends that his constitutional claim was not barred by the earlier state and federal adjudications. We need not reach the question of the preclusive effect of the state proceedings, for we find that the prior federal adjudication precluded the instant suit.

As the district court correctly noted, the Supreme Court has held that a party normally need only be afforded "one full and fair opportunity" to litigate an issue. *E.g., Blonder-Tongue Laboratories, Inc. v. University of Ill. Found.*, 402 U.S. 313, 328 (1971). Here, appellant had already had that opportunity. Although he claims that Judge Mishler's earlier dismissal of his case was not on the merits of appellant's constitutional claims, Judge Mishler's *later* order — the subject of this appeal — specifically held that the earlier dismissal *did* reach the constitutional question, and did find that appellant had been afforded the process properly due him under the Constitution. Appellant is in essence asking us to overturn Judge Mishler's

reading of his own earlier order of dismissal.

We decline to do so for, after reviewing both decisions, we believe Judge Mishler's reading was correct. Judge Mishler's earlier order had given two reasons for dismissal: 1) the lack of merit in appellant's constitutional claims, and 2) the need to defer to the ongoing state proceedings. The court had then held that "[f]or all the reasons stated" — including, we conclude, the lack of merit in the constitutional claims — appellant's complaint was dismissed. The district court's later ruling was correct in holding that the appellant was barred, by principles of res judicata, from raising anew those very same constitutional claims.

Affirmed.

s/ Lawerence W. Pierce
HONORABLE LAWRENCE W. PIERCE,

s/ Frank X. Altimari
HONORABLE FRANK X. ALTIMARI,
Circuit Judges,

s/ Robert J. Kelleher
HONORABLE ROBERT J. KELLEHER,
District Judge.

N.B. This summary order will not be published in the federal reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

APPENDIX B — MEMORANDUM OF DECISION AND ORDER DATED OCTOBER 18, 1988

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 88-1349

ROBERT W. DAMINO,

Plaintiff,

-against-

MARTIN C. BARRELL, et al.,

Defendants.

APPEARANCES:

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MISHLER, District Judge

Appendix B

MEMORANDUM OF DECISION AND ORDER

In this action, commenced April 29, 1988, plaintiff Robert Damino ("Damino") seeks damages pursuant to 28 U.S.C. § 1983 based on the revocation of Damino's license to practice medicine on June 19, 1987. Defendants move to dismiss[1] on several grounds, including an assertion that the action is barred by the doctrines of res judicata and collateral estoppel and request that attorney's fees be imposed on plaintiff pursuant to Fed. R. Civ. P. 11.

Background

In July 1983, plaintiff, a physician licensed to practice in the State of New York, was charged with professional misconduct pursuant to N.Y. Educ. Law § 6509(9). The charges included: unprofessional conduct, gross negligence, gross incompetence, negligence and incompetence. Allegations made against the plaintiff included: sexual misconduct with, as well as mental and physical abuse of, one patient; the encouragement of questionable fraternization between patients; taking a patient who had been criminally institutionalized to an X-rated movie; and subsequently threatening the same patient. Plaintiff was also charged with various controlled drug regulation violations, the practice of medicine while impaired, and habitual use of barbituates and amphetamines. The latter two drug charges were eventually dropped.

Upon notification to the plaintiff of the charges and date of hearing, disciplinary proceedings were conducted by a panel of the New York Board for Professional Medical Conduct. In May, 1984, the hearing committee issued a report which made specific findings of fact, conclusions and recommendations to sustain the charges with some modifications.

Appendix B

In April, 1985 the New York Commissioner of Health, upon review of the entire record of the proceedings, recommended that the hearing panel report be accepted in full. Thereafter, in November 1985, the Regents Review Committee unanimously recommended to the Board of Regents that the hearing panel's findings be adopted with minor modifications. On December 13, 1985 the Board of Regents voted to accept the findings of fact and conclusions of the hearing panel as modified by the Regents Review Committee. In January 1986, the Commissioner of Education of New York ordered the plaintiff's license to practice medicine revoked.

Pursuant to N.Y. Education Law § 6510-a(4) and Article 78, N.Y.C.P.R., on March 5, 1986, plaintiff brought a proceeding for review of the Commissioner's decision in the New York Supreme Court, Appellate Division. On May 12, 1986, the Appellate Division, Third Department granted plaintiff's motion to stay the order of revocation pending a decision. On October 9, 1986, the Appellate Division, Third Department unanimously confirmed the determination of the Board of Regents and dismissed plaintiff's petition.[2]

By order to show cause, plaintiff moved before the Appellate Division for leave to appeal to the Court of Appeals and requested a stay of the enforcement of the October 9, 1986 order pending the determination of the motion and a request for a preliminary injunction. This request was denied and on June 17, 1987 plaintiff commenced an action in this court requesting a stay of the state court proceedings under Fed. R. Civ. P. 65(b) and a claim for relief under 42 U.S.C. § 1983. At that time plaintiff also requested that this court issue a temporary restraining order to stay the Appellate Division Court order to revoke his license pending the outcome of his § 1983 action. This court declined to grant

plaintiff's motion for the temporary restraining order and on June 20, 1987 plaintiff surrendered his license to practice medicine. On September 28, 1987, this court dismissed plaintiff's action on two grounds: (1) the complaint failed to state a cause of action under 28 U.S.C. § 1983, and (2) principles of abstention suggested that the action should be dismissed. *Damino v. O'Neill*, CV 87-2003 (E.D.N.Y. Sept. 28, 1987) (the "Opinion"). Finally, on December 17, 1987, the New York Court of Appeals denied leave to appeal the decision of the Appellate Division. *Damino v. Board of Regents*, 70 N.Y. 2d 613 (1987).

In the present action, plaintiff seeks damages for alleged violations of his due process rights based on the revocation of his medical license. (Complaint ¶¶ 31, 44, 52, 58, 66, 74-80, 89-93, 97-100, 111-121). The claim, which is repeated a number of times in the complaint, is, in substance, identical to plaintiff's claim in his previous federal action.[3]

Further, the procedural improprieties alleged by plaintiff, including evidentiary standards, inference and fairness, were thoroughly addressed by the state court. *See Damino v. Board of Regents*, 124 A.D. 2d 271 (3rd Dep't 1986).

DISCUSSION

The Supreme Court in *United States v. Mendoza*, 464 U.S. 154, 104 S. Ct. 568, 571 (1984), restated the preclusive effect of a prior adjudication on a subsequent action: "[O]nce a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive in a subsequent suit based on a different cause of action involving a party to the prior litigation. *Montana v. United States*, 440 U.S. 147, 153, 99 S. Ct. 970, 973, 59 L. Ed. 2d 210 (1979)." Quoting from *Stendefer v. United States*,

447 U.S. 10, 24, 100 S. Ct. 1999, 2008 (1980), the Court pointed to the reason for preclusion as follows: "[N]o significant harm flows from enforcing a rule that affords a litigant only one full and fair opportunity to litigate an issue, and . . . there is no sound reason for burdening the courts with repetitive litigation." *Mendoza*, 104 S. Ct. at 572.

Issue preclusion may be invoked where the issue of law or fact in the subsequent proceeding has been litigated and determined by a valid and final judgment. *Wilson v. Steinhoff*, 718 F.2d 550, 552 (2d Cir. 1983). It is not necessary that the parties be identical in both suits. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S. Ct. 645 (1979) (permitting the use of offensive issue preclusion). Courts have construed 28 U.S.C. § 1728 so as to require federal courts to "give preclusive effect to state court judgments whenever the courts of the state from which the judgments emerge would do so." *Allen v. McCurry*, 449 U.S. 90, 96, 101 S. Ct. 411, 415-16 (1980). In *Allen v. McCurry, supra,* the Supreme Court held that "issues actually litigated in a state-court proceeding are entitled to the same preclusive effect in a subsequent federal § 1983 suit as they enjoy in the courts of the State where the judgment was rendered." *Migra v. Warren City School District,* 465 U.S. 75, 104 S. Ct. 892, 897 (1984) (emphasis added).

In this case, it is clear that plaintiff is precluded from bringing this action by both the state court decision, which rejected plaintiff's appeal, and the prior federal court action, in which this court held that the revocation of plaintiff's medical license did not create a claim for relief under 42 U.S.C. § 1983. Plaintiff's claim of due process violations has already been litigated twice. It need not be litigated again. Therefore, defendant's motion to dismiss should be granted.

Appendix B

Defendants request that plaintiff be ordered to pay reasonable attorney's fees pursuant to Fed. R. Civ. P. 11. Such sanctions should be imposed only where the court "finds that [the] claim was frivolous, unreasonable or groundless, or that the plaintiff continued to litigate after it clearly became so." *Hughes v. Rowe*, 449 U.S. 14, 16 (1980), *quoting Christiansbury Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978). Further, there must be fair notice and an opportunity to be heard. *Sanko S.S. Co. v. Galin*, 835 F.2d 51, 53 (2d Cir. 1987).

Both of these elements are present here. After all relevant issues had been decided by both the state and federal courts, this case is brought, once again, before this court. In plaintiff's previous federal action, this court unambiguously stated:

> Although defendant did not raise the point, plaintiff is collaterally estopped from raising in federal court the claim that he was denied a fair hearing or procedural due process. These same claims were raised before and decided by the state court proceeding in the Appellate Division.

Opinion, n.1. With respect to plaintiff's claim of due process violations, this court stated:

> Given all the opportunities plaintiff has had to protect his license and all the procedural safeguards built into the state's revocation procedures, it is clear to this court that plaintiff's constitutional due process rights were fully protected and plaintiff's claim to the contrary is without merit . . . Any claim of denial of procedural due process circumstances borders the absurd.

Appendix B

Opinion at 9 (citations omitted).

Regardless, counsel for plaintiff chose to file an action based on violations of procedural due process. This action is frivolous and vexatious, and sanctions should be imposed. In responding to this motion, counsel for plaintiff had a full and fair opportunity to oppose the imposition of Rule 11 sanctions, and offered nothing in response.

Rule 11 sanctions may be imposed "upon the person who signed [the pleadings], a represented party or both." Fed. R. Civ. P. 11. Mr. William D. Friedman, counsel for plaintiff, signed all the relevant pleadings, and knew or should have known that this action was meritless. Accordingly, costs and reasonable attorney's fees are to be assessed jointly against the plaintiff, Robert W. Damino, and his attorney, William D. Friedman and awarded to defendants.

ORDER

The defendants' motion to dismiss is granted. The Clerk of the Court is directed to enter judgment in favor of the defendants Martin C. Barrell, et al., and against the plaintiff dismissing the complaint, together with costs as taxed by the Clerk and attorney's fees to be fixed by the court, and it is further

ORDERED that the Attorney General for the State of New York serve an affidavit or affirmation specifying the hours spent, the nature of the services rendered and the hourly rate requested. Within five (5) days after receipt of the affidavit or affirmation plaintiff is directed to serve and file an opposing affidavit or affirmation.

s/ Jacob Mishler
U.S.D.J.

Appendix B

FOOTNOTES

1. Both parties have submitted affidavits of fact in support of their positions on this motion, which may not be considered by the court in deciding a 12(b)(6) motion. *Ryder Energy Distribution v. Merrill Lynch*, 748 F.2d 774 (2d Cir. 1984). However, the determination of this motion did not require reference to the affidavits.

2. *Damino v. Board of Regents*, 124 A.D. 2d 271 (3rd Dep't 1986), *app. den.*, 70 N.Y.2d 613 (1987).

3. Paragraph 29 of the complaint in plaintiff's prior federal action states:

> Defendants, under color of law, have deprived the plaintiff of his property rights to his said employment and said license which are guaranteed to him under the due process of law provision of the Fourteenth Amendment.

Complaint, CV 87-2003, July 17, 1987.

APPENDIX C — MEMORANDUM OF DECISION AND ORDER DATED SEPTEMBER 28, 1987

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 87-2003

ROBERT W. DAMINO,

Plaintiff,

-against-

PEGGY O'NEILL as Executive Director of Creedmoor Psychiatric Center; STEVEN E. KATZ, as Commissioner of New York State Office of Mental Health; and Board of Regents of the State of New York,

Defendants.

APPEARANCES:

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HONORABLE ROBERT ABRAMS
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Adina King, Assistant
Attorney General, *Of Counsel*

Appendix C

MISHLER, District Judge

Plaintiff brought this action pursuant to 42 U.S.C. § 1983, alleging that the defendants' revocation of his license to practice medicine, depriving him of his property right to employment as a physician and his license to practice medicine in New York, was a violation of due process of law. Plaintiff has also applied for a temporary restraining order, pursuant to Fed. R. Civ. P. 65(b), to stay the enforcement of the order revoking his license to practice medicine pending a final determination by the New York courts. Defendants move: (1) pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss this action on the grounds that plaintiff has failed to state a cause of action under 28 U.S.C. §§ 1331 or 1343; (2) this court should abstain under the *Younger* doctrine; and (3) any award of back pay is a matter for the state courts to decide. Defendants also seek attorney fees and costs under Fed. R. Civ. P. 11. For the reasons discussed below, defendants' motion to dismiss is granted.

Background

In July 1983, plaintiff, a physician licensed to practice in the State of New York, was charged with professional misconduct pursuant to N.Y. Educ. Law § 6509(9). The charges include: unprofessional conduct, gross negligence, gross incompetence, negligence and incompetence. Allegations made against the plaintiff included: sexual misconduct with, as well as mental and physical abuse of, one patient, the encouragement of questionable fraternization between patients, taking a patient who had been criminally institutionalized to an X-rated movie and subsequently threatening this same patient. Plaintiff was also charged with various controlled drug regulation violations, the practice of medicine while impaired, and habitual use of barbiturates and

amphetamines. The latter two drug charges were eventually dropped.

Upon notification to the plaintiff of the charges and date of hearing, disciplinary proceedings were conducted by Professional Medical Conduct. In May 1984, the Hearing Committee issued a Report which made specific findings of fact, conclusions and recommendations to sustain the charges with some modifications.

In April 1985 the New York Commissioner of Health, upon review of the entire record of the proceedings, recommended that the hearing panel report be accepted in full. Thereafter, in November 1985, the Regents Review Committee unanimously recommended to the Board of Regents that the hearing panel's findings be adopted with minor modifications. On December 13, 1985 the Board of Regents voted to accept the findings of fact and conclusions of the hearing panel as modified by the Regents Review Committee. In January 1986, the Commissioner of Education of New York ordered the plaintiff's license to practice medicine revoked.

Pursuant to N.Y. Education Law § 6510-a(4) and Article 78, N.Y.C.P.R., on March 5, 1986, plaintiff brought a proceeding for review of the Commissioner's decision in the New York Supreme Court, Appellate Division. On May 12, 1986, the Appellate Division, Third Department granted plaintiff's motion to stay the order of revocation pending a decision. On October 9, 1986, the Appellate Division, Third Department unanimously confirmed the determination of the Board of Regents and dismissed plaintiff's petition.

By order to show cause, plaintiff moved before the Appellate

Appendix C

Division for leave to appeal to the Court of Appeals and requested a stay of the enforcement of the October 9, 1986 order pending the determination of the motion and a request for a preliminary injunction. This request was denied and on June 17, 1987 plaintiff commenced an action in this court requesting a stay of the state court proceedings under Fed. R. Civ. P. 65(b) and a claim for relief under 42 U.S.C. § 1983. At that time plaintiff also requested that this court issue a temporary restraining order to stay the Appellate Division Court order to revoke his license pending the outcome of his § 1983 action. This court declined to grant plaintiff's motion for the temporary restraining order and on June 20, 1987 plaintiff surrendered his license to practice medicine. Before the court now is plaintiff's due process violation claim under § 42 U.S.C. § 1983 and plaintiff's request for a stay of the state court order to revoke his license pending the outcome of plaintiff's appeal before the New York Court of Appeals.

DISCUSSION

There are two issues before this court. The first is whether plaintiff has stated a cognizable claim under 42 U.S.C. § 1983. This statute provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other Proper proceeding for redress. For the purposes

> of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Plaintiff alleges that defendants have deprived him of his property right to his license and employment and in doing so have violated plaintiff's right to due process of law. (Complaint ¶ 29). In his memorandum of law plaintiff argues that the state's revocation proceedings raise several constitutional procedural due process issues including: the use of negative inference, the hearing panel's act of taking official notice of findings from a prior administrative hearing, the use of negative inference from a witness' refusal to testify against plaintiff, and the use of sealed records. Plaintiff also alleges that the failure of the New York State courts to continue to stay the order of revocation until the appeal pending before the Court of Appeals is decided violates plaintiff's fourteenth amendment rights. (Complaint ¶ 35).

A complaint consisting of nothing more than vague allegations, blanket statements and setting forth no basis upon which a violation of the Civil Rights Acts can be established fails to state a claim under Fed. R. Civ P. 12(b)(6). *See, e.g., Martin v. N.Y. State of Mental Hygiene,* 588 F.2d 371 (2d Cir. 1978). The general rule is that in determining the sufficiency of a claim challenged under Rule 12(b)(6), the allegations of the complaint are taken to be true and construed most favorably to the pleader, *United States v. Mississippi*, 380 U.S. 128, 143, 85 S. Ct. 808, 816 (1965). However, complaints relying on 42 U.S.C. § 1981 *et seq.* are insufficient unless they contain some allegations of facts indicating a deprivation of civil rights. *See, e.g., Powell v. Jarvis*, 460 F.2d 551 (2d Cir. 1972). In a § 1983 action, to withstand a Rule 12(b)(6) motion to dismiss, the plaintiff must

demonstrate that the liberty, property or constitutional right abridged was without due process of law. *Baker v. McCollan*, 443 U.S. 137, 99 S. Ct. 2689 (1979). We find there are no facts presented in, or even suggested by, plaintiff's vague and conclusory allegations which would be sufficient to support his claims.

Plaintiff's license to practice medicine is a property right which is entitled to constitutional protection and which cannot be revoked without due process of law. *Bell v. Burson*, 402 U.S. 535, 539, 91 S. Ct. 1586, (1971); *Horodner v. Cahn*, 360 F. Supp. 602 (E.D.N.Y. 1973).

Due process is a flexible concept. *Matthews v. Eldridge*, 424 U.S. 319, 334, 96 S. Ct. 893, 902, (1976); *Charry v. Hall*, 709 F.2d 139 (2d Cir. 1983). The fundamental requisites of due process are; (1) notice of charges; (2) the opportunity to be heard; and (3) the process used must be reasonably calculated to protect the person's property interest. *Boddie v. Connecticut*, 401 U.S. 371, 378-79, 91 S. Ct. 780 (1971); *Charry v. Hall*, 709 F.2d at 145.

The particular process depends upon the nature of the proceedings and the interests of both the government and the individual. *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011 (1970). In the matter of the licensing of physicians, the state has a substantial interest in regulating who is professionally and morally qualified to practice medicine in order to protect the health and safety of the public. *Surmeli v. New York*, 412 F. Supp. 394 (S.D.N.Y. 1976), *aff'd*, 556 F.2d 560 (2d Cir. 1976). The individual physician also has a significant interest in the revocation proceedings as his livelihood and professional reputation are at stake. *Mildner v. Gulotta*, 405 F. Supp. 182, 195 (E.D.N.Y. 1975), *aff'd sub nom. Levin v. Gulotta*, 425 U.S. 901, 96 S. Ct. 1489 (1976). Yet, given all the opportunities plaintiff has had to protect his license and all the procedural safeguards built into the state's revocation procedures, it is clear to this court that plaintiff's

constitutional due process rights were fully protected and plaintiff's claim to the contrary is without merit. *Foreman v. Ambach*, 525 F. Supp. 722 (S.D.N.Y. 1981).

Specifically, plaintiff was given a full disciplinary hearing at which he was represented by counsel, and given the opportunity to testify, to produce evidence and to cross examine witnesses. In addition, the hearing panel's findings were specific, detailed and subject to independent review at several levels of higher authority. Plaintiff has also availed himself of state court review proceedings, first in the Appellate Division and now in the New York Court of Appeals. Any claim of denial of procedural due process under the circumstances borders on the absurd. *See Forman v. Ambach,* 525 F. Supp. 722 (S.D.N.Y. 1981).

It is well settled under federal and state law that due process considerations do not require the full array of procedural tools available to civil litigants be afforded to a plaintiff in an administrative hearing. *See e.g., Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487 (1985); *Sinha v. Ambach*, 91 A.D.2d 703, 457 N.Y.S.2d 603 (3rd Dep't 1982). Nor do the technical rules of evidence apply in an administrative hearing. *Richardson v. Perales*, 402 U.S. 389, 407-08, 91 S. Ct. 1420, 1430-31 (1971); *Hecht v. Monaghan*, 307 N.Y. 461, 121 N.E.2d 42 (1954). In light of these prior decisions, plaintiff's allegations regarding evidentiary points do not state a claim for relief.

Plaintiff's allegation that the state court's refusal to stay the revocation of his license pending the outcome of the appeal, violates his due process rights is without merit. Plaintiff cites no authority nor has this court found any authority to support this proposition. Plaintiff's property right to practice medicine is not

an absolute right. Unquestionably, the state has the power to revoke his license once the due process requirements of notice and opportunity to be heard have been fulfilled. *See Superintendent of Massachusetts Correctional Institution v. Hill,* 472 U.S. 445, 105 S. Ct. 2768, 2774 (1985). The state's legitimate and important concern of public health and safety far outweigh any interest of plaintiff to continue his livelihood. *Cf. Mitchell v. Association of Bar of City of New York,* 40 N.Y.2d 153, 386 N.Y.S.2d 95, 351 N.E.2d 743 (1976).

The final question that must be addressed is whether this case is properly before this court.

It is well established that under the doctrine of federal abstention, articulated in *Younger v. Harris,* 401 U.S. 37, 91 S. Ct. 746 (1971) and recently reiterated by the Supreme Court in *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. ____ , 107 U.S. 1519, 55 U.S.L.W. 4457 (1987), a federal court is required to abstain when there is an ongoing state procedure that precludes interference. The *Younger* doctrine, though originally limited to state criminal proceedings, is now fully applicable to civil proceedings in which important state interests are involved. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S. Ct. 1200 (1975); *Moore v. Sims*, 442 U.S. 415, 99 S. Ct. 2371 (1979). Further, the Supreme Court has stated that *Younger* requires that a federal court abstain from interfering with pending professional disciplinary proceedings in a state court. *Middlesex Ethics Committee v. Garden State Bar Ass'n.*, 457 U.S. 423, 102 S. Ct. 2515 (1982).

In *Middlesex*, 457 U.S. at 432, the Court applied the following three prerequisites for *Younger* abstention and determined that the federal court should not interfere in the state's ongoing attorney disciplinary proceedings, if:

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1. the disciplinary proceedings constitute an ongoing state judicial proceeding;

2. the disciplinary proceedings involve an important state interest; and

3. there is an adequate opportunity for the plaintiff to raise his constitutional claim in the state proceedings.

Clearly, the instant case fulfills all three requirements.

First, the state court review proceeding is obviously judicial in nature. Second, the state has a strong interest in protecting the health and safety of its citizens and the granting and revocation of physicians' licenses is clearly an integral part of this state function. For a federal court to interfere in state court proceedings and directly countermand the state court order to revoke plaintiff's license would be extremely disruptive to the state judiciary system and would be in complete disregard of any notions of federalism and comity. The circumstances of this case do not warrant such an intrusion. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 608, 95 S. Ct. 1200 (1974); *Lang v. Berger*, 427 F. Supp. 204, 215 (S.D.N.Y. 1977). Finally, plaintiff has had the opportunity to raise all his constitutional claims in the state proceeding. *Id. See Moore v. Sims*, 442 U.S. 415, 99 S. Ct. 2371 (1979) (strong federal policy against interference absent great immediate irreparable injury to plaintiff's constitutional rights).

For all the reasons stated above defendants' 12(b)(6) motion to dismiss is granted.[1]

Defendants' request for attorney's fees and costs is denied.

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Under the standard set forth in *Howe v. Rowe*, 449 U.S. 5, 101 S. Ct. 173 (1980), we do not find the plaintiff's action to be so totally meritless or groundless as to warrant an award of attorney's fees and costs.

SO ORDERED.

s/ Jacob Mishler
U.S.D.J.

Appendix C

FOOTNOTE

1. Although defendant did not raise the point, plaintiff is collaterally estopped from raising in federal court the claim that he was denied fair hearing or procedural due process. These same claims were raised before and decided by the state court proceeding in the Appellate Division.

> The federal court presented with a state court judgment is required to give that judgment the same force and effect as it has in the state in which it was rendered (citations omitted) . . . the state court's determination is res judicata of all other actions as a matter of statutory law. The fact that a federal civil rights action is involved, moreover, is not by itself a valid reason for denying full faith and credit to the state court proceeding. (citation omitted).

Mitchell v. National Broadcasting Co., 553 F.2d 265, 274 (2d Cir. 1977).